

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

LYNNETTE HERNANDEZ,	)	
	)	
Plaintiff,	)	Civ. No. 06-6161-TC
	)	
vs.	)	
	)	AMENDED
CITY OF SALEM, a Municipal	)	
Corporation and ANDREW	)	ORDER AND OPINION
CONNOLLY, an individual,	)	
	)	
Defendants.	)	
	)	

Coffin, Magistrate Judge:

Plaintiff, Lynnette Hernandez, brings this civil rights action against defendant City and defendant Connolly alleging a violation of 42 U.S.C. § 1983 and various state law claims. Defendants moved for summary judgment, and the court heard oral argument on the motion on July 17, 2007. For the reasons outlined below, the court denies summary judgment in part and grants summary judgment in part. This order and opinion is amended to correct a typographical error on page 10.

**Factual Background**

The parties are familiar with the factual background. Accordingly, the factual details will be set forth below only as they are relevant to the instant motion.

1 Plaintiff's claims stem from her arrest on the night of  
2 August 21, 2005. At the time relevant to this case, plaintiff  
3 was a bartender at the La Playa Cantina, which is an  
4 establishment licensed to sell liquor by the Oregon Liquor  
5 Control Commission (OLCC). The La Playa is located in the Plaza  
6 Del Sol, next to the Tropicana Lounge, which is a dance club for  
7 minors and is not licensed to sell alcohol. The La Playa and the  
8 Tropicana share a common hallway, so it is possible for patrons  
9 to have access between the two establishments without having to  
10 exit and re-enter the building.

11 On the night of August 21, 2005, defendant Connolly was on  
12 duty. At approximately 12:50 a.m., Connolly and his partner were  
13 driving a marked police car back to the station to end their  
14 shift. Because Connolly knew that problems often occurred in the  
15 Plaza Del Sol parking lot, he wanted to drive through the parking  
16 lot on the way back to the station.

17 As Connolly drove through the parking lot, he saw a man  
18 spray another in the face with pepper spray. The pepper sprayed  
19 man entered the Tropicana. Believing he may have witnessed a  
20 crime, Connolly entered the Tropicana to investigate as well as  
21 to determine if the man needed medical attention, despite  
22 protests by Plaza Del Sol security personnel. Connolly located  
23 the man in the Tropicana in the men's room. The man told  
24 Connolly that he did not need medical attention and did not wish  
25 to press charges.

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1           On his way to the men's room, Connolly had observed several  
2 alcoholic beverage containers on tables in the Tropicana.  
3 Connolly knew that it was a violation of OLCC rules for alcohol  
4 to be in the Tropicana; he knew that the Tropicana shared a  
5 common hall with the La Playa; and he knew that the La Playa  
6 served alcohol. Connolly also knew that the Tropicana and the La  
7 Playa were two different businesses owned by separate people.

8           After breaking up an altercation which was brewing in front  
9 of the La Playa and asking the individuals to leave the property,  
10 Connolly entered The La Playa and observed plaintiff serving  
11 alcoholic drinks to patrons. Connolly asked plaintiff if she was  
12 the bartender. When plaintiff replied that she was, Connolly  
13 told plaintiff that he was doing a bar check and requested to see  
14 her OLCC server's permit. When plaintiff could not locate her  
15 server's permit in her purse, she called the La Playa's owner,  
16 Ida Lafky and insisted that Connolly speak to Lafky. Lafky  
17 advised Connolly that plaintiff's permit was being renewed; that  
18 the OLCC had sent the renewed permit to the wrong address; and  
19 that the OLCC had advised Lafky that plaintiff could continue to  
20 serve liquor even though she did not physically have the permit  
21 because the OLCC had the permit on record. Lafky told Connolly  
22 that he could check plaintiff's permit status with the OLCC.

23           Connolly ended the phone call with Lafky when the  
24 individuals who he had earlier asked to leave the property  
25 returned to the hallway. Connolly went outside the La Playa to  
26 deal with these two individuals.

27           When Connolly returned to the La Playa, he placed plaintiff  
28 under arrest and transported her to the police station.

1 A copy of the renewal application was present at the La  
2 Playa in a file underneath the bar on the night Connolly arrested  
3 plaintiff. In her deposition, plaintiff testified that she found  
4 the file the morning after she was arrested; she did not look for  
5 it that night because there was "a lot of commotion." (Hernandez  
6 Deposition at 11:16-20.)

7 At the July 17, 2007 hearing, defendant's attorney noted  
8 that Connolly testified at deposition that the only way to  
9 contact the OLCC to determine whether a person has a valid  
10 server's permit was to contact the OLCC by phone during business  
11 hours-8:00 a.m to 5:00 p.m. (Connolly Deposition at 21: 13-24.)

#### 12 Standards

13 Summary judgment is appropriate where "there is no genuine  
14 issue as to any material fact and . . . the moving party is  
15 entitled to a judgment as a matter of law." Fed. R. Civ. P.  
16 56(c). The initial burden is on the moving party to point out  
17 the absence of any genuine issue of material fact. Once the  
18 initial burden is satisfied, the burden shifts to the opponent to  
19 demonstrate through the production of probative evidence that  
20 there remains an issue of fact to be tried. Celotex Corp. v.  
21 Catrett, 477 U.S. 317, 323 (1986). Rule 56(c) mandates the entry  
22 of summary judgment against a party who fails to make a showing  
23 sufficient to establish the existence of an element essential to  
24 that party's case, and on which that party will bear the burden  
25 of proof at trial. In such a situation, there can be "no genuine  
26 issue as to any material fact," since a complete failure of proof  
27 concerning an essential element of the nonmoving party's case  
28 necessarily renders all other facts immaterial. The moving party

1 is "entitled to a judgment as a matter of law" because the  
2 nonmoving party has failed to make a sufficient showing on an  
3 essential element of her case with respect to which she has the  
4 burden of proof. Id. at 32. There is also no genuine issue of  
5 fact if, on the record taken as a whole, a rational trier of fact  
6 could not find in favor of the party opposing the motion.  
7 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
8 586, 106 S.Ct. 1348, 1355 (1986); Taylor v. List, 880 F.2d 1040  
9 (9th Cir. 1989).

10 On a motion for summary judgment, all reasonable doubt as to  
11 the existence of a genuine issue of fact should be resolved  
12 against the moving party. Hector v. Wiens, 533 F.2d 429, 432  
13 (9th Cir. 1976). The inferences drawn from the underlying facts  
14 must be viewed in the light most favorable to the party opposing  
15 the motion. Valadingham v. Bojorquez, 866 F.2d 1135, 1137 (9th  
16 Cir. 1989). Where different ultimate inferences may be drawn,  
17 summary judgment is inappropriate. Sankovich v. Insurance Co. of  
18 North America, 638 F.2d 136, 140 (9th Cir. 1981).

#### 19 Discussion

20 Defendants assert that they are entitled to summary judgment  
21 on all of plaintiff's claims. Defendant Connolly asserts that he  
22 is protected from suit by qualified immunity. Defendant City  
23 asserts that it is immune from suit under Monell v. New York City  
24 Dept. of Social Services, 436 U.S. 658, 692 (1978).

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1     **A. Probable Cause**

2           Defendants argue that there is no issue of fact concerning  
3 whether Connolly had probable cause to arrest plaintiff and,  
4 therefore, defendants are entitled to summary judgment on  
5 plaintiff's 42 U.S.C. § 1983 illegal arrest claim (claim 1), her  
6 false arrest claim against the City (claim 3), her malicious  
7 prosecution claim against the City (claim 4), and her false  
8 imprisonment claim( claim 5).

9           The La Playa and Tropicana are establishments which are open  
10 to the public. There is no reasonable expectation of privacy in  
11 a public place. See, e.g., Rawlings v. Kentucky, 448 U.S. 98,  
12 104(1980). Here, Connolly entered the Tropicana, which is a  
13 public establishment, and observed alcoholic beverage containers  
14 that were on tables in plain view. He then went into the La  
15 Playa, which was also open to the public. The court finds that  
16 there is no issue of fact concerning the reasonableness of  
17 Connolly's entry into either the Tropicana or the the La Playa.

18           A warrantless arrest of an individual in a public place for  
19 a misdemeanor committed in an officer's presence is consistent  
20 with the Fourth Amendment if the arrest is supported by probable  
21 cause. United States v. Watson, 423 U.S. 411, 424 (1976).  
22 Probable cause to arrest exists if, at the moment of arrest, the  
23 facts and circumstances known to the arresting officers are  
24 "sufficient to warrant a prudent man in believing that the  
25 [arrestee] had committed or was committing an offense." Beck v.  
26 Ohio, 379 U.S. 89,91,(1964). However, the creation of a pretext  
27 to justify an arrest violates the Fourth Amendment. United  
28 States v. Prim, 698 F.2d 972, 975 (9th Cir. 1983). Whether an

1 arrest is a based on a pretext turns on the motivation of the  
2 arresting officer. United States v. Smith, 802 F.2d 1119, 1124  
3 (9th Cir. 1986).

4 Here, Connolly saw empty alcohol bottles when he walked  
5 through the Tropicana. He knew that alcohol was not allowed in  
6 the Tropicana, and almost immediately after seeing the alcohol  
7 there, went into the La Playa and did a bar check.

8 At the moment that he arrested plaintiff Connolly had been  
9 informed that plaintiff had a valid server's permit, even though  
10 she was not in physical possession of it because of a mailing mix  
11 up. Lafky, the La Playa's owner, had advised Connolly that the  
12 OLCC had expressly stated that plaintiff could continue to serve  
13 alcohol while the permit was re-sent. Connolly knew that it was  
14 possible to call OLCC to check the status of a permit, but that  
15 it could only be done during business hours.

16 Additionally, the record shows that there is a conflict in  
17 Oregon law concerning whether a person selling or serving alcohol  
18 must be able to immediately present the permit upon demand.  
19 O.R.S. § 471.360 requires that a person serving alcohol shall  
20 have a valid service permit issued by the OLCC and shall make the  
21 service permit available "at any time while on duty for immediate  
22 inspection by...any...peace officer." Failure to produce a valid  
23 server's permit is a misdemeanor offense. In contrast, O.R.S. §  
24 471. 375 provides that any person may mix, sell, or serve  
25 alcoholic beverages if the person prepares "in duplicate an  
26 application for a service permit prior to mixing, selling, or  
27 serving alcoholic beverages...." Oregon Administrative Rule 845-  
28 009-0010 provides that, pursuant to O.R.S. § 471.375, some

1 service permit applicants may begin selling or serving alcohol  
2 after the applicant completes an official service permit and an  
3 authorized person endorses and sends the application to the OLCC.  
4 OR ADC 845-009-0010.

5 Because of this conflict, it is possible for a server to be  
6 in violation of § 471.360, while nonetheless complying with  
7 § 471.375 and Oregon Administrative Rule 845-009-0010.

8 Given that Connolly had information that plaintiff had a  
9 valid permit which was not in her possession due to a mailing  
10 mix-up and given the conflict in Oregon's statutes<sup>1</sup>, it was not  
11 reasonable for Connolly to arrest plaintiff on the § 471.360  
12 misdemeanor charge, without a warrant, at approximately 1:00 a.m.  
13 If Connolly had concerns about plaintiff serving alcohol without  
14 a valid permit, he could have shut down the La Playa (or at least  
15 informed Hernandez that she could no longer serve alcohol until  
16 her permit could be verified). This would have given Connolly a  
17 chance to verify the plaintiff's permit with the OLCC during  
18 business hours or to get a warrant for plaintiff's arrest from  
19 the District Attorney. Encouraging officers to arrest citizens,  
20 without a warrant late at night, on such a dubious misdemeanor  
21 charge (given the co-existence of § 471.375), is neither in  
22 society's best interest, nor is it good (i.e. reasonable)  
23 policing.

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26 <sup>1</sup>The court does not expect the burden of resolving a statutory  
27 conflict to rest on a police officer; however, the court concludes  
28 that it is reasonable for an officer to be familiar with the relevant  
statutes and to discuss such conflicts with the District Attorney  
before making warrantless arrests based on a statute which is  
contradicted by another statute.



1           Given the information that Connolly had, he should have  
2       conducted additional investigation before rushing for the  
3       handcuffs. One may infer from the circumstances that the officer  
4       did not care whether Lafky's explanation was true, as he had the  
5       technicality on which to base an arrest (the permit was not  
6       physically present). However, given the counterweight of  
7       \$471.375 and the related Oregon Administrative Rule, he needed to  
8       be more thorough in his investigation before making this  
9       particular warrantless arrest.

10          Furthermore, there is an issue of fact regarding whether  
11       Connolly's reason for arresting plaintiff was pretextual.  
12       Connolly saw alcoholic beverage bottles on tables in the  
13       Tropicana, knew that the Tropicana was a dance club for minors,  
14       and wanted to know "why there was alcohol allowed in that  
15       particular business." (Connolly Deposition at 11:16-25.)  
16       Shortly after seeing the alcohol in the Tropicana, Connolly  
17       entered the La Playa, observed plaintiff serving alcohol, and did  
18       a bar check. Connolly subsequently arrested plaintiff when she  
19       could not produce a copy of her server's license.

20          As previously discussed, Connolly could have chosen another  
21       course of action to determine whether plaintiff was, in fact,  
22       serving alcohol without a valid OLCC permit. He could have  
23       instructed Hernandez to cease serving for that night. The next  
24       day, Connolly could have contacted the OLCC to verify plaintiff's  
25       permit or sought an arrest warrant from the District Attorney for  
26       violation of the 417.360 misdemeanor charge. Connolly, however,  
27       chose not to investigate the information he had that plaintiff  
28       had a valid permit and simply decided to take her to jail.

1 In summary, the record reveals the following facts: Connolly  
2 felt that the Plaza Del Sol was a "trouble spot;" he entered the  
3 Tropicana that night, to check on a pepper sprayed man; Connolly  
4 contacted plaintiff only after seeing alcohol bottles in the  
5 Tropicana club; and, despite information that plaintiff had a  
6 valid server's permit, he chose to not investigate this  
7 information and opted instead to take her to jail. These facts  
8 raise an issue of Connolly's motivation for arresting plaintiff.  
9 Based on these facts, Connolly might have used the § 471.360  
10 misdemeanor charge as a pretext for arresting plaintiff because  
11 he suspected she had been serving alcohol to minors. Clearly, he  
12 lacked probable cause for the latter offense: the alcohol  
13 containers in the Tropicana may or may not have been purchased at  
14 the La Playa; the purchases may or may not have been by minors;  
15 the bartender may or may not have been plaintiff. At the time he  
16 arrested plaintiff, officer Connolly simply had no information  
17 regarding such matters.

18 These factual issue must be resolved by a jury.  
19 Accordingly, the court finds that summary judgment on the  
20 probable cause issue is not appropriate because there is an issue  
21 of fact concerning whether the reason for plaintiff's arrest was  
22 pretextual and, therefore, violated the Fourth Amendment.

23 **B. Qualified Immunity**

24 Defendants contend that Connolly is protected from suit by  
25 qualified immunity. "[G]overnment officials performing  
26 discretionary functions [are entitled to] a qualified immunity,  
27 shielding them from civil liability as long as their actions  
28 could have reasonably been thought consistent with the rights

1 they are alleged to have violated." Anderson v. Creighton, 483  
2 U.S. 635, 638 (1987) (citations omitted).

3 The Supreme Court has clarified that the qualified immunity  
4 analysis is a three-part inquiry. Saucier v. Katz, 533 U.S. 194,  
5 201 (2001). First, the court must consider whether the facts  
6 taken in a light most favorable to the party asserting the injury  
7 show that the defendants violated the plaintiff's constitutional  
8 right. Id. Next, the court must determine if the right was  
9 clearly established at the time of the alleged violation. Id.  
10 A constitutional right is clearly established if the contours of  
11 the right are sufficiently clear that a reasonable official would  
12 understand that what he or she was doing violated that right.  
13 Anderson, 483 U.S. at 640. Finally, the court must determine  
14 whether a reasonable officer in these circumstances would have  
15 thought that his or her conduct violated the alleged right.  
16 Saucier, 533 U.S. at 201.

17 Defendants assert that, even taking the facts in a light  
18 most favorable to plaintiff, she cannot show that Connolly  
19 violated the Fourth Amendment when he arrested her without a  
20 warrant because he had probable cause to arrest her for a  
21 violation of § 471.360. Defendants are correct that commission of  
22 a misdemeanor in an officer's presence provides probable cause  
23 for an arrest; however, the facts viewed in a light most  
24 favorable to plaintiff show a violation of her Fourth Amendment  
25 rights.

26 Evidence concerning a defendant's subjective intent is  
27 generally irrelevant in a qualified immunity defense, but a  
28 defendant's state of mind is relevant where it is an element of

1 the alleged constitutional violation. Crawford-El v. Britton,  
2 523 U.S. 574, 589 (1998). Here, Connolly's subjective intent is  
3 relevant to whether Connolly violated the Fourth Amendment by  
4 using a pretext to justify plaintiff's arrest. The facts viewed  
5 in a light most favorable to plaintiff, could justify the  
6 conclusion that the arrest for not producing a server's permit  
7 was a pretext for arresting plaintiff for serving alcohol to  
8 minors.

9 It is clearly established that probable cause is needed for  
10 a warrantless arrest and that an arrest based on a pretext  
11 violates the Fourth Amendment.

12 A reasonable officer in Connolly's circumstances would have  
13 known that arresting plaintiff for a pretextual reason violated  
14 her Fourth Amendment rights. The reasonableness of Connolly's  
15 conduct cannot be ascertained without resolution of the factual  
16 issue of whether plaintiff's arrest was pretextual.

17 Even if there was no evidence of a pretextual arrest,  
18 Connolly would not be entitled to qualified immunity. Qualified  
19 immunity is applicable if an officer makes a reasonable mistake  
20 of fact, or a reasonable mistake of law. Saucier, 533 U.S. at  
21 205-06. In order for an officer to make an unreasonable mistake  
22 of law, the applicable law must "put the officer on notice that  
23 his conduct would be clearly unlawful" given the circumstances of  
24 the case. Id. at 202. Here, Connolly's mistake was unreasonable  
25 because Connolly, as a police officer, was charged with knowledge  
26 of both § 471.360 and § 471.375; therefore, he should have been  
27 aware of the conflict between the statutes. Additionally,  
28 Connolly had information that plaintiff had a valid server's

1 permit and had express permission from the OLCC to serve, even  
2 though the permit was not in her physical possession. These  
3 circumstances (the conflict between § 471.360 and § 471.375  
4 coupled with Connolly's information that plaintiff had a valid  
5 permit) would have put a reasonable officer on notice that his  
6 conduct was clearly unlawful. Accordingly, Connolly is not  
7 entitled to qualified immunity.

### 8 C. Municipal Liability

9 Defendants argue that the City is shielded from liability on  
10 plaintiff's claims under Monell v. New York City Dept. of Social  
11 Services, 436 U.S. 658 (1978).

12 A municipality is not subject to liability for the  
13 constitutional violations of its employees based on respondeat  
14 superior, but it is subject to liability for its employees'  
15 constitutional violations resulting from official policy, custom,  
16 or practice of deliberate indifference to the rights of  
17 individuals. Monell, 436 U.S. at 691. A policy is a choice made  
18 by an official with final decision-making authority to follow a  
19 course of action from among various alternatives. Oviatt v.  
20 Pearce, 954 F.2d 1470, 1477 (9th Cir. 1992). To establish  
21 liability on a local governmental entity for failure to act to  
22 preserve constitutional rights in a civil rights suit, a  
23 plaintiff must establish: (1) that she possessed a constitutional  
24 right of which she was deprived; (2) that the municipality had a  
25 policy; (3) that this policy amounts to deliberate indifference  
26 to plaintiff's constitutional right; and (4) that the policy is  
27 the moving force behind the constitutional violation. Canton v.  
28 Harris, 489 U.S. 378, 389-91 (1989).

1 In support of her contention that an official city policy  
2 resulted in the violation of her constitutional rights, plaintiff  
3 points to police briefings which requested that officers drive  
4 through the Plaza Del Sol's parking lot on their way back from  
5 patrol assignments. She argues that, because Connolly conducted  
6 the briefings in his capacity as a supervisor, the drive through  
7 request constituted an official City practice or policy. There  
8 is no evidence here that Connolly was the final policy maker  
9 regarding patrol policies. Nothing in the record supports the  
10 conclusion that the drive through requests were the product of  
11 the City's official course of action. Pembaur v. City of  
12 Cincinnati, 475 U.S. 469, 483-84 (1986) (plurality opinion). The  
13 court finds that the City is entitled to summary judgment under  
14 Monell.

15 **D. Intentional Infliction of Emotional Distress**

16 Plaintiff also brings an Oregon state law claim for  
17 intentional infliction of emotional distress. To successfully  
18 plead such a claim, plaintiff must show that: (1) defendant  
19 intended to inflict severe mental or emotional distress or that  
20 distress is certain or substantially certain to result from  
21 defendant's conduct; (2) defendant's acts caused plaintiff severe  
22 emotional or mental distress; and (3) defendant's acts consisted  
23 of some extraordinary transgression of the bounds of socially  
24 tolerable conduct. McGanty v. Staudenraus, 321 Or. 532, 543  
25 (1985).

26 The intent element may be satisfied when a defendant knows  
27 that severe distress is certain or substantially certain to  
28 result from his conduct. Id. at 550-51. A court considers

1 whether conduct is socially tolerable on a case-by-case basis.  
2 Buckel v. Nunn, 133 Or. App. 399, 404 (1995). Justification is  
3 a complete defense to a plaintiff's claim of intentional  
4 infliction of emotional distress. Gigler v. City of Klamath  
5 Falls, 21 Or. App. 753, 763 (1975).

6 Here, Connolly arrested plaintiff in the La Playa, placed  
7 her in the back of a police car, and took her to the police  
8 station at approximately 1:00 a.m. Connolly should have been  
9 substantially certain that plaintiff would suffer severe distress  
10 as a result of the arrest. Connolly's conduct in arresting  
11 plaintiff, however, does not amount to an "extraordinary  
12 transgression of the bounds of socially tolerable conduct" so as  
13 to give rise to an intentional infliction of emotional distress  
14 claim. McGanty, 321 Or. at 550-51. The evidence shows that  
15 Connolly was acting in the normal course of duty when he arrested  
16 plaintiff. Plaintiff alleges that the arrest was motivated by  
17 racial bias against Hispanics, but she does not allege that any  
18 racial slurs were used during or before her arrest. She does not  
19 allege that there was any threat of or actual force. Although  
20 summary judgment on plaintiff's Fourth Amendment claim is not  
21 appropriate because a factual dispute exists regarding whether  
22 the stated reason for the arrest was pretextual, the court cannot  
23 find that Connolly's conduct in arresting plaintiff gives rise to  
24 an intentional infliction of emotional distress claim.  
25 Accordingly, defendants are entitled to summary judgment on this  
26 claim.

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Conclusion

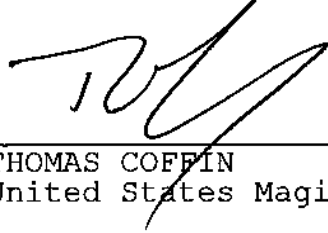
For the above reasons, the court orders that:

1. Defendants' motion for summary judgment on plaintiff's first, third, fourth, and fifth claims is DENIED.
2. Defendant Connolly's motion for summary judgment based on qualified immunity is DENIED.
3. Defendant City's motion for summary judgment under Monell is GRANTED.
4. Defendants' motion for summary judgment on plaintiff's second claim is GRANTED.

This action will proceed against defendant Connolly on plaintiff's 42 U.S.C. § 1983 claim (first claim) and false imprisonment claim (fifth claim).

IT IS SO ORDERED.

Dated this 30<sup>th</sup> day of July, 2007.

  
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THOMAS COFFIN  
United States Magistrate Judge